Robert Clarke & Co., 65 West Fourth St., Cin., O. [*Aug.*, 1876.

IN THE

Supreme Court of Ohio.

DECEMBER TERM, 1875.

The Cincinnati Street Railroad Company, the Passenger Railroad Company of Cincinnati, the City Passenger Railroad Company, the Cincinnati Consolidated RAILWAY *Company, and Erasmus Gest,*

Plaintiffs in Error,

against

The City of Cincinnati, J. F. Blackburn, Richard Smith, William Wiswell, Joseph Trounstine, and Robert Mitchell,

Defendants in Error.

ERROR TO THE SUPERIOR COURT OF CINCINNATI.

PROPOSITIONS FOR PLAINTIFFS,

By E. A. FERGUSON,

Counsel for Plaintiffs.

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STATEMENT OF THE CASE.

On the 19th of April, 1873, there was filed in the Superior Court of Cincinnati a petition the caption of which named the parties plaintiff as follows:

"Richard Smith, William Wiswell, Jos. Trounstine, and Robert Mitchell, tax-payers of the City of Cincinnati, by the solicitor of said city, plaintiffs."

The petition begins as follows:

"Plaintiffs state that they are tax-payers of the said city of Cincinnati, and that it is a part of the duty of the solicitor to

apply to a court of competent jurisdiction for an order or injunction to restrain the misapplication of the funds of the corporation, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinances governing the same, or which was procured by fraud or corruption.

"That by an ordinance of the common council of said city, passed March 28, 1873, entitled 'an ordinance prescribing the terms and conditions of street passenger railroads,' it was ordained as follows:"

The ordinance, containing seventeen sections, was then set out in full in the body of the petition, after which "the plaintiffs further state" that the ordinance was approved by the mayor on the 1st of April, but that there was appended to his approval the following:

"With the understanding that the old companies, should they accept under this ordinance, will keep the streets in repair, as per conditions imposed upon the new companies in this ordinance."

The petition then states that the mayor, after approval as aforesaid, returned the ordinance to the city clerk, who thereupon caused it to be published.

The remainder of the petition, with the verification, is as follows:

"That on April 14, 1873, each of the railroad companies, defendants hereto, did, by its president, and E. Gest, manager of Route No. 9, did tender to the city clerk its acceptance of the terms of the ordinance aforesaid, but that said city clerk declined to receive such acceptances, for the reason, among others, that the time required by law for the publication of said ordinance had not expired.

"That the several railroad companies, defendants hereto, and Erasmus Gest, will again tender, and J. F. Blackburn,

clerk of the city aforesaid, will receive, on behalf of the city, acceptances of the terms of this ordinance, set forth above, unless restrained by the court. Plaintiff submits to the Court that the ordinance of the common council above recited is in contravention of the laws governing said corporation; that the execution or performance of the contract contemplated by the terms of said ordinance will be an abuse of said city's corporate powers; that the indorsement upon said ordinance by the mayor, as aforesaid, does not veto or qualify any part or the whole of the same; that said ordinance is in conflict with the terms of the contracts heretofore entered into with the city by the railroad companies, defendants hereto, and the manager or proprietor of Route No. 9, and in which *these plaintiffs*, as tax-payers, have valuable interests; and that the adoption of said ordinance, or the execution of any contract in pursuance of the terms and provisions of the same, or the exercise of any duties, privileges, or rights, under or by virtue of said ordinance, will work *upon these plaintiffs*, as tax-payers, lasting and irreparable injury.

"Wherefore, on the 18th day of April, an application was made to the city solicitor *by the parties named in the heading of this case* to enjoin the acceptance of the terms of the ordinance aforesaid, and the city from executing or in any way recognizing or enforcing said ordinance.

" *Wherefore the solicitor notified plaintiffs that he would apply for the injunction as requested.*

"*Plaintiffs therefore pray* that the Court will allow an injunction as follows, restraining the railroad companies and Erasmus Gest, and each of them, defendants hereto, from again tendering to the city of Cincinnati, or its clerk, acceptances of the terms of the ordinance aforesaid, and from exercising any privileges thereunder; the city clerk from receiving or in any way recognizing such acceptance of any railroad company whatever; the city from executing, enforcing, or in any manner recognizing the ordinance aforesaid. *They further pray* that, upon final hearing of this cause, the acceptances heretofore tendered to the city clerk, as set forth above, or any rights that may have been thereby acquired, may be declared null and void; that

such injunction may be made perpetual if it be found proper, or such other and further relief granted as may be found equitable and just. By

"JOHN W. WARRINGTON,

"*Solicitor for City of Cincinnati.*

"*State of Ohio, Hamilton County, ss.:*

"Richard Smith, *plaintiff herein*, being first duly sworn, says that the facts contained in the foregoing petition are true.

"RICHARD SMITH.

"Sworn to before me, and subscribed in my presence, this 19th day of April, 1873.

"[SEAL,] A. E. CRAMER,

"*Notary Public, Hamilton Co., Ohio.*"

Demurrers were filed in behalf of the defendants on two grounds: 1. That the plaintiffs had not legal capacity to sue in this action. 2. That the facts stated did not constitute a cause of action. The questions of law arising on the demurrers were reserved to the general term of said Court, and were there decided on the 22d of June, 1874, the Court holding that the demurrers were not well taken, and rendered judgment as prayed for in the petition, enjoining each of the defendants perpetually, as therein asked.

To review and reverse this judgment and decision the present action is brought.

PROPOSITIONS OF THE PLAINTIFFS.

Two propositions will be presented by the plaintiffs in error, the maintenance of either of which will require the reversal of the judgment below and the dismissal of the case.

I.

The plaintiffs in the action had no right to bring it. It could only be brought under sections 159 and 160 of the municipal code, which provide as follows:

"He," the solicitor of the corporation, "shall apply to a court of competent jurisdiction for an order of injunction to restrain the misapplication of the funds of the corporation, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the corporation, in contravention of the laws and ordinances governing the same, or which was procured by fraud or corruption."

Section 160, as amended April 18, 1870:

"In case the solicitor shall fail, upon the request of any of the tax-payers thereof, to make the application provided for in the preceding section, it shall be lawful for such tax-payer to institute a suit, in his own name, on behalf of the corporation; provided that no such suit or proceeding shall be entertained by any Court until such request shall have first been made in writing."

There is no statement anywhere in the petition that the request of the tax-payers was *in writing*, nor of a refusal by the solicitor to make the application. On the contrary, the averment is that when the tax-payers made application to the solicitor, on the 18th of April, 1873, he notified them that *he* would apply for an injunction, as requested. Instead, however, of making an application in his own name, as solicitor, or in the name of the city, he brought an action in the name of the tax-payers, as their attorney. The caption, the averments, the verification, the

bond given, the judgment that the equity of the case is with *the plaintiffs*, and that *they* recover their costs, all show that this suit was one by the tax-payers named.

It will not do, therefore, to treat, as the court below did, this action as one brought by the solicitor in his representative official capacity. The best that can be said in favor of sustaining it is that bringing it in the name of the tax-payers, shows a *failure* upon the part of the solicitor to perform his duty, supposing the action to be well founded in law. But the objection still remains that it nowhere appears in the record that *a request in writing* was made by the tax-payers named, or any others. On the contrary, the record negatives this. It is evident that the parties named, *upon a consultation* with the solicitor, on the 18th of April, requested him to apply for an injunction; that he replied that he would, and thereupon brought this action. Section 160 of the municipal code, as amended April 18, 1870, is express in its language "that no such suit or proceeding *shall be entertained* by any court, until such request shall have *first* been made *in writing*." Before this amendment, no request *in writing* was required; and we submit that this record must show such a request—otherwise the amendment would be a nullity.

Again, under the code (section 85), the caption is part of the petition; so that if we treat this action as one brought by the solicitor, we would have the anomaly of a petition without a plaintiff named and without a verification, and an injunction granted and continued without an affidavit upon which to base it or a bond to indemnify the parties restrained.

II.

As stated in the first proposition, the action could only be sustained under the jurisdiction given by sections 159 and 160 of the municipal code. Section 159 specifies three causes of action :

1. The misapplication of the funds of the corporation.
2. The abuse of its corporate powers.
3. The execution or performance of ANY CONTRACT, *made in behalf of the corporation*, in contravention of the laws and ordinances governing the same, or which was procured by fraud or corruption.

We maintain that the ordinance and the contract made with the plaintiffs in error can not be called in question under any one of these causes of action, upon the facts stated in the petition.

It was not claimed below, and the statements of the petition do not warrant any such claim, that there was to be any misapplication of corporate funds. The petition avers that *the ordinance*, not the contract, is in contravention of the laws governing said corporation; that the execution or performance of *the contract* will be an abuse of the city's corporate powers; and that *said ordinance* is in conflict with the terms of the contracts "heretofore" entered into with the plaintiffs in error, without specifying in what particulars it would conflict, or stating the terms of former contracts. Those averments, therefore, are not averments of facts, but of conclusions of law.

Admitting, for the sake of argument, that, by the acceptance, under section 13, of *the terms* of the ordinance, the former contracts were varied, it does not follow that

the new contract so made is in contravention of the laws governing the city. The new contract may be more beneficial than the old; and whether it is or not, the presumption of law is that it is one the corporate authorities have the right to make, until the contrary is shown.

There is, therefore, no ground of action stated under the third class of causes of action. And such was the view taken by the Court below. Its judgment was based upon the supposed abuse of the corporate powers of the city by the passage of the ordinance and its acceptance by the plaintiffs in error. In this we claim the Court erred, and adopt as part of our argument what was said by one of the judges of the Superior Court (Judge Tilden) in another action known as the "Baymiller street case:"

> "The action is brought by and in the name of the City Solicitor, in behalf of the City of Cincinnati, and against the City too, to restrain the execution of an ordinance regularly adopted by the governing body of the corporation itself. It is brought under section 159 of the Municipal Code; and the right to recover is placed on the ground, first, that the passage of the ordinance of the 17th January, 1873, and its acceptance by the proprietors of Route No. 5 constituted a contract 'in behalf of the corporation' of the City, made 'in contravention of the laws and ordinances governing the same,' and on the further ground that the passage of the ordinance itself, independently of the circumstance of its subsequent acceptance, was an abuse of the corporate powers of the city.
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> "The acceptance of the ordinance was undoubtedly the completion of a contract between the applicants for the extension and the city. But section 159 does not refer to or include contracts in general. It is confined to contracts made in *behalf* of the city, and to such only of these as are so made 'in contravention of the laws and ordinances governing the same.' A contract formed by

the acceptance of a grant made by the city of an easement in its public streets, is not a contract made in behalf of the city. The city has no property right in the public streets. Such property is in the public, and the grant is a contract made in behalf of the public. The city, in making such a contract, acts not in its own behalf as a corporation, but as the agent of the public. The power which is exercised in making the grant is a governing power of the State, delegated to the city in a particular instance; and the making of the contract is merely an authorized mode of execution of the power. The power to make the contract carries with it the right to compel its performance; but an action for this purpose, as well as one founded upon a contract made in behalf of the city, should be prosecuted by and in the name of the city, unless made in contravention of law, and not by and in the name of the solicitor. He can sue in his own name only in a case such as is pointed out in section 159; and a contract made or an act done by the city, not in its own behalf as a corporation, but in behalf of the State or public, is not such a case. The remedy given by the section was intended for the benefit of the public, and it necessarily operates adversely to the city. The city is intrusted with the public moneys, with power to raise money by taxation, to apply the money so raised to public uses, and to enter into a great variety of contracts in its own behalf, involving the expenditure of money or the use or disposition of the property of the city. It is the duty of the city council to execute these functions honestly and faithfully, and in conformity to law. If these functions are properly performed, the public and the tax-payers are sufficiently protected. It is not until the city becomes unfaithful that a further remedy is needed. This is the contingency for which it was the design of the section to provide. In the event of its occurrence, it would be absurd to expect that the authorities of the city would prosecute an action against themselves to correct their own abuses. Hence the section has constituted the city solicitor the direct representative of the tax-payers, and made it his duty, in their behalf,

to prosecute an action against the city and the authorities of the city for the purposes of restraint. And in case he, too, should become unfaithful, an alternative remedy is given to the tax-payers themselves. In either case, however, the remedy is limited by the very words which confer it, and construction can push it no further. If it be invoked on the ground of contract, it must be made to appear that the contract is one relating to the property rights of the city as a corporation, and whose execution will be injurious to the tax-payers. If the contract be one not having this relation, but one adopted incidentally and as a mode of execution of a governing power, and not made 'in behalf of the corporation,' resort must be had for the correction of the abuse to a common-law remedy, such as a mandamus or prohibition, to be prosecuted in the name of the State; and a remedy in equity, at the instance of the solicitor, can not be sustained.

"The construction of the clause relating to *abuses of the corporate powers* is also required. This expression implies the existence of the power. *It can not be said that a power is abused if none exists. If the power do not exist, an act done in its name is simply void.* If it do exist, and is wantonly or corruptly applied, it is voidable by proof. It has been long settled that a municipal corporation, proceeding to act without authority, will be restrained, in equity, when the threatened act will be producive of special injury to private persons. But, where the authority of the municipal body is not open to question, and, especially, when the threatened act is one involving the exercise of the judgment and choice of such body, equity will not interfere except, in the language of the elementary books and the reported decisions, in a case of 'plain and manifest' abuse. What is a case of plain and manifest abuse, can not be determined on any general rule. Each case must depend on its own circumstances, and be determined by the analogies afforded by the cases which have been actually decided. Bribery of the governing body, or fraud or other corruption in it, leading to the impeachable act, certainly would amount to a manifest abuse. *A mere mis-*

take or error of judgment would not. The passage of an ordinance found to be contrary to law would be an act done without authority; but if honestly done; in the fair exercise of the right of choice and judgment, it would not be an abuse of power. But, whether the power be exceeded, or threatened to be abused, the tendency, to authorize a suit in equity, must be to invade a right of private property. It is only with such rights that equity assumes to deal: it interferes only for the maintenance of civil rights; and it has no jurisdiction to interfere with the public duties of any of the branches or departments of government. . . . If I am right, therefore, with respect to the nature which I have imputed to the power involved in the passage of the ordinance, it follows, on well-known principles, that equity has no jurisdiction to interpose, unless it can be deduced from the provisions of section 159 itself.

"But the language of these provisions will not warrant such a construction. There are no words conferring upon the courts any new jurisdiction, or creating any new remedy. Their effect is to make the solicitor the representative of the tax-payers, and to authorize him, in their behalf, to bring an action in his own name, and to apply for an injunction. But the power of a court to entertain the application must be derived from the laws by which it is created and its jurisdiction defined; and its remedies must be applied in conformity to the rules which the law prescribes for the regulation of its practice. These rules do not, in my judgment, as I have already said, authorize an action by and in the name of the city solicitor in a case such as the petition presents."

The court below were of opinion that the ordinance and contract were an abuse of the corporate powers in the following particulars:

1. That the entire ordinance shows that the substantial rights and privileges attempted to be conferred by its terms upon existing companies are not intended to be subject to the right of council to take away or abridge them.

2. That section 2 of the ordinance provides, in reference to railroads in operation, that they shall be required to pay an annual car license of $5 per car on small cars, and $10 for large cars; while, as to companies thereafter formed, they are required to pay $10 as car license for each and every car.

3. That section 14 provides, in reference to existing companies, that they shall only be required to make good such streets or portions of streets as they may make extensions of their tracks upon, and does not, therefore, require them to keep the streets through which the cars run in repair; but that section 15 compels all future companies constructing railroads, not only to put the streets in good repair, but to keep them in repair.

4. That section 9 enacts, that not more than one line of street railroad shall be granted upon the same street without the consent of existing companies.

Let us take up these objections in their order.

1. That the substantial rights conferred are not intended to be subject to the right of council to take them away or abridge them. Certainly not. There would be no contract if one party to it could, at its pleasure, alter or vary its terms. But it does not follow that everything contained in a statute or ordinance creates a right or becomes a contract.

The language of Campbell, J., in 16 Howard, 407, 408, in the *State Bank of Ohio* v. *Knoop*, is applicable here:

> "I will not say that a contract may not be contained in a law; but the practice is not to be encouraged, and *courts discourage the interpretation which discover them.* A common informer sues for a penalty, or a revenue officer makes a seizure under a promise that, on conviction, the recovery

shall be shared; and yet the State discharges the forfeiture, or prevents the recovery, by a repeal of the law—violating thereby no vested right, nor impairing the obligation of any contract.

"A captor may be deprived of his share of prize-money, pensioners of their promised bounty, at any time before their payment.

"Salaries may be reduced; offices having a definite tenure, though filled, may be abolished; faculties may be withdrawn; the inducements to invest capital impaired and defeated by the varying legislation of a State, without impairing constitutional obligation.

"The whole society is under the dominion of law; and acts which seem independent of its authority, rest upon its toleration. The multifarious interests of a civilized State must be continually subject to the legislative control. General regulations, affecting the public order, or extending to the administrative arrangements of the State, must overrule individual hopes and calculations, though they may have originated in its legislation. It is only when rights have *vested* under laws that the citizen can claim a protection to them as property. Rights do not vest until all the conditions of the law have been fulfilled, with exactitude, *during its continuance*, or a *direct engagement* has been made limiting legislative power over *and producing* an obligation."

It will hardly be contended, for instance, that the police regulations of section 16 (Rec. 8, 9), are contract stipulations which the council could not amend or repeal. It is, therefore, only those parts of the ordinance which show plainly by their terms that they were intended to be contract stipulations, that form part of the agreement made between the city and the plaintiffs in error, by their acceptance of the terms of the ordinance under section 13.

2. This leads to the consideration of the second and

third particulars, stated by the Court below in reference to car license and street repairs.

How can an agreement charge existing companies a license of $5 for small cars and $10 for large cars, and to require them to keep only the portions of streets on which their extensions are made, be construed into an agreement that the council will always maintain the rate of license provided in the ordinance for new companies, and to require them to keep the streets in repair. If, as Judge Campbell says, in the opinion already quoted, Courts discourage the interpretation which discovers contracts in laws, assuredly, without some unequivocal language showing an intention upon the part of council to do the illegal act of bartering away its legislative authority, the Court will not hold that the acceptance of the *terms* of the ordinance created an agreement, upon the part of the council, never to change the rate of license to new companies to be formed, or to always require them to repair. It was perfectly competent for council, the day after the acceptance, to have changed or repealed these provisions; and the presumption of law is, unless the contrary intention is manifestly shown, that there was no intention to bind the legislative power.

3. The last particular specified is in regard to section 9. It reads as follows:

> "The city auditor shall, when instructed by the city council, advertise for ten days in the official papers of the city, stating the route or routes which have been designated by council for street railroads, and ask for sealed proposals, under this ordinance, to construct the same; and the corporation or company of individuals that will bid for the lowest price of commutation tickets, in packages, shall be considered the successful bidder: Provided, however, the city council shall be the judges of the bids; and pro-

> vided, further, that this section shall not apply to any extension heretofore granted of the track of any street railroad (where the rate of fare is not increased) under existing laws; *and provided, further, that not more than one line of street railroad shall be granted upon the same street without the consent of the existing company.*"

The objection to it is that the last proviso enacts that not more than one line of street railroad shall be granted on the same street. Conceding it to be illegal, under the decision in *The State* v. *The Cincinnati Gas Co.*, 18 Ohio St. 292, there is this to be said about it—it is wholly prospective, as shown by its terms; the city auditor is to advertise the route or routes which have been designated by council for street railroads, and ask for sealed proposals for their construction. Surely this language can only be applicable to new routes or lines. Now, as "it is the natural office of a proviso to qualify what goes before, and of which it forms a part—not to introduce *new provisions*"—(Redfield, J., 19 Vt. 131), the proper construction of this section is to limit it to lines and companies created after the passage of the ordinance. This proviso does not, therefore, form any part of the contract made by the acceptance. And it is to be noted, that section 13 does not require an acceptance of the "ordinance" generally, but of its "*terms*," evidently meaning those which, when accepted, would become the stipulations of a contract, and that this proposition is contained in a *proviso* to that section.

We submit, that in none of the particulars specified has there been, as to the plaintiffs in error, an abuse of the corporate powers of the city; and ask, therefore, that the judgment be reversed and the action dismissed.

E. A. FERGUSON,
Counsel for Plaintiffs.